LI FANG TECK & ANOR

v.

LEE JOON SHIEW

HIGH COURT SABAH AND SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[ORIGINATING SUMMONS NO: 24-143-98-II]
8 JUNE 1999

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating summons - Whether admissible - Rules of the High Court 1980, O. 41 r. 1*

CIVIL PROCEDURE: *Service - Originating summons - Served twice on defendant - Whether proper service*

In this case, before the hearing of the originating summons ('OS'), the defendant raised two preliminary objections. The defendant submitted that the affidavit-in-support ('the affidavit') sworn five days earlier than the filing of the OS was inadmissible contrary to O. 41 r. 1 of the Rules of the High Court 1980. Also the service of the OS was improper as it was served twice on the defendant.

Held:

[1] An affidavit filed prior to the originating summons may be admitted depending on the length of time, and the cause or matter that it supports. In this instance, the application for the removal of the caveat was the cause or matter and the affidavit sworn preceding the filing of the OS by five days was an irregularity. The affidavit was admissible if resworn and refiled.

[2] As the OS was extended to 31 March 1999, the second service on 1 December 1998 was valid service. As the first service of the OS was disputed by the defendant, there was no rule against the plaintiff re-serving the OS for the second time. It was not improper, at the most it was redundant if the first service was good.

[Preliminary objections overruled; costs to the plaintiff.]

Case(s) referred to:

Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 ***(refd)***

H Stacey v. Diamond Metal Products Co Ltd & Anor [1935] MLJ 249 ***(refd)***

Kewangan Bersatu Bhd (Previously Known As Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***
Ong Heok & Anor v. Ooi Bee Tat & Ors [1982] 2 MLJ 326 ***(refd)***
Palka Utama Shipping Co Ltd v. "Sri Melati" (Owners) & Parties Interested The "Sri Melati" [1976] 1 MLJ 283 ***(refd)***
Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd [1988] 2 MLJ 308 ***(refd)***
Lee Choo Yam Holdings Sdn Bhd v. Khoo Yoke Wah & 6 Ors [1989] 1 CLJ 946 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 41 r. 1
Sarawak Land Code, s. 177

For the plaintiffs - Wong Siong Tung; M/s Tan, Yap & Tang Advocs
For the defendant - Kho Lik Kiat; M/s Kho & Poh Advocs

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

At the onset of the hearing of the originating summons (encl. 2) the defendant raised two preliminary objections (encl. 8) that:

(a) The affidavit of Li Wing Fong affirmed on 3 June 1998 in support of the originating summons is inadmissible for non-compliance with O. 41 r. 1 Rules of the High Court 1980; and

(b) The purported service of the originating summons on the defendant's counsel on 1 December 1998 was improper.

The defendant submitted that the said affidavit was sworn on 3 June 1998 which preceded the originating summons which was filed on 8 June 1998, *ie* 5 days earlier than the originating summons. Order 41 r.1 stated that 'every affidavit sworn in a cause or matter must be entitled in that cause or matter' and cited as the authority the case of *Arab Malaysian Finance Bhd v. Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118.

The plaintiff submitted that there is a line of authorities which states that such an affidavit filed before the originating summons it supported is an irregularity and is admissible if the affidavit is resworn and refiled. He cited in support the following cases:

H. Stacey v. Diamond Metal Products Co Ltd & Anor [1935] MLJ 249; *Palka Utama Shipping Co Ltd v. "Sri Melati" (Owners) & Parties Interested; The "Sri Melati"* [1976] 1 MLJ 283; *Ong Heok & Anor v. Ooi Bee Tat & Ors* [1982] 2 MLJ 326; *Lau Yeok Lin & Ors v. Hip Soon Engineering & Construction Sdn Bhd* [1988] 2 MLJ 308; *Lee Choo Yam Holdings Sdn Bhd v. Khoo Yoke Wah & 6 Ors* [1989] 1 CLJ 946; and *Kewangan Bersatu Bhd (Previously Known As Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79.

There are two lines of authorities on whether an affidavit filed prior to the date of the originating process is admissible. One line of the authorities suggests that an affidavit filed earlier in time does not support the cause or matter contrary to O. 41 r. 1 Rules of the High Court 1980, and therefore, it is a nullity. See *Arab Malaysian Finance Sdn Bhd* case (*supra*). The other line of authorities suggests that it is an irregularity and it may be admitted if the affidavit is resworn and refiled.

The White Book goes as far as to say:

> Affidavit will not be rejected because they have been sworn shortly before the proceedings started. The Court may nevetheless at any time direct the re-swearing of such an affidavit and will do so if the affidavit seeks to prove facts which have to be shown to be existing at the date of the commencement of the proceedings and cause of action would not be otherwise be established.

From a preponderance of Malaysian authorities, it may be observed that an affidavit, filed before the action it supports, is an irregularity and is admissible if the affidavit is resworn and refiled. In my view, an affidavit filed prior to the originating summons may be admitted depending on the length of time, and the cause or matter that it supports. In the instant case, it was five days earlier that the summons in chambers and the cause or matter is an application for the removal of caveat under s. 177 of the Sarawak Land Code. It seems that the caveat was the cause or matter, which the plaintiff wants it to be removed, and the affidavit in support precedes the summons in chambers by five days seems to be an irregularity, and it can be admissible if the affidavit is resworn and refiled. Thus the first objection is overruled.

The defendant submitted that the plaintiff cannot effectively serve the originating summons twice, and the defendant does not know which service is effective for it to reply. Therefore the second service of the originating summons on 1 December 1998 was improper. The service of the originating summons on 1 December 1998 bears the attendance date as 27 August 1998 which had expired. This is more so as the first service of the originating summons had been challenged by the plaintiff, in an application to strike out the service of the originating summons which is awaiting adjudication.

The plaintiff submitted that the originating summons was deposited at the appointed address for service as stated in the caveat. It was received by Lee Chi Min the father of the defendant, (which was denied by Lee) *vide* the affidavit of Ahmad Zaidi bin Arshad affirmed on 25 August 1998.

The defendant by a summons in chambers dated 23 October 1998 applied to set aside the affidavit of service of Ahmad Zaidi bin Arshad and is pending. Subsequently, the originating summons which was fixed for hearing on 27 August 1998 was rescheduled to 5 November 1998. By a notice of hearing dated 5 November 1998 issued by the court, addressed to the defendant's counsel as well as the plaintiff, the defendant was informed that the originating summons and the defendant's summons in chambers would be heard on 25 February 1999 which again was rescheduled to 31 March 1999. Thus the plaintiff served the originating summons again on the defendant on 1 December 1998.

It appears that the originating summons has been extended to 31 March 1999, and as such it is a valid service on 1 December 1998 on the defendant's counsel. As the service of the originating summons on Lee Chi Min is disputed by the defendant, there is no rule against the plaintiff re-serving the originating summons for the second time, and this time on the defendant's counsel. It appears to be not improper, at the most it is redundant if the first service is good. Justice would be better served should the second service on the defendant's counsel be allowed. In the circumstances, the objection lacks merit and I would overrule it.

Costs to the plaintiff.